91-898

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

In re MARTIN A. WELT,

Petitioner

PETITION FOR WRIT OF MANDAMUS

Martin A. Welt, Ph.D.
4 Rocky Heights Road
Morris Plains, N.J. 07950
Pro Se
(201) 989-0043

QUESTION PRESENTED

Whether a United States District Court judge after issuing an order, complete with extensive written opinion, that reduces a defendant's sentence, based on a timely Rule 35 motion, and later vacates portions of that order, ex parte, without giving the defendant any notice or an opportunity for a hearing, violates his constitutional right to due process?

PARTIES TO THE PROCEEDINGS

1. Petitioner is Martin A. Welt, Ph.D. Mr. Welt was a defendant in the District Court, and appellant in the Court of Appeals for the Third Circuit.

2. Respondent, United States District Court Judge, Maryanne Trump Barry, District of New Jersey.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

Case No.

In re Martin A. Welt,

Petitioner

Petition For Writ of Mandamus
To The United States District Court
District of New Jersey

Martin A. Welt petitions for a writ of mandamus to disallow the vacating of a United States District Court order without notice or a hearing in contradiction to due process guaranteed under the United States Constitution.

OPINIONS AND JUDGMENTS BELOW

The Decision of the United States Court of Appeals for the Third Circuit denying Petitioner's Sur Petition for Rehearing was entered on June 13, 1991

and appears at p. A-13 of the Appendix to this Petition. The Decision of the United States Court of Appeals for the Third Circuit denying Petitioner's appeal was entered on May 17, 1991 and appears at p. A-11 of the Appendix to this Petition. The Decision of the United States District Court to deny Petitioner's motion for reconsideration entered on April 13, 1991 and appears at p. A-9 of the Appendix to this Petition. The Order of the United States District Court vacating an earlier Order was entered on April 26, 1990 and appears at p. A-7 of the Appendix to this Petition. The Order of the United States District Court granting Petitioner's motion for reduction of sentence under Rule 35 was entered on March 13, 1990 and appears at p. A-5 of the Appendix to this Petition. The Opinion of the United States District Court was entered on March

13, 1990 and appears at p. A-1 of the Appendix to this Petition.

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this petition under 28 U.S.C. § 1651(a) pertaining to the April 10, 1990 Order of United States District Court Judge Maryanne Trump Barry, United States District Court for the District of New Jersey, filed on April 26, 1990, vacating her order of March 13, 1990, without any notice or hearing. The United States Court of Appeals for the Third Circuit has denied two separate appeals for remanding and rehearing.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall . . . be deprived of life, liberty, or property without due process of law . . ."

Section 1 of the Fourteenth Amendment to the United States Constitution reinforces the rights of citizens to due process and equal protection under the laws.

STATEMENT OF THE CASE

Petitioner Martin A. Welt, Ph.D., was convicted on July 18, 1988, of conspiring to make false statements, violation of the Atomic Energy Act, and of giving false, fictitious and fraudulent statements to the Nuclear Regulatory Commission. United States v. Martin Welt, Docket No. 91-5325 (D.C.N.J.). District Judge Maryanne Trump Barry set petitioner's sentence at two years imprisonment, three years probation and a $50,000 fine. Prior to sentencing,

Judge Barry read aloud the sentencing recommendation of Joseph Harrington, the probation officer, who suggested a seven (7) year sentence, a $395,000 fine and three years probation. Judge Barry gasped, and suggested to the court, "he probably thought safety was a issue". While serving his sentence, petitioner filed pro se, a successful Rule 35 motion reducing the "sentence" to the time served. Judge Barry wrote an extensive opinion (Appendix A), and granted the order on March 13, 1990 (Appendix B). Several days after returning to work, the probation officer visited the petitioner to "explain what was required", involving details of petitioner's probation. The probation officer was not aware of the details involved in Judge Barry's order and accompanying opinion, which the petitioner gave him to read. The

probation officer read the letter, apparently agreed with petitioner's view, wished petitioner good luck, and left the office. On April 26, 1990, without any notice or opportunity for a hearing, and without an opinion or explanation, Judge Barry vacated her March 13, 1991 order and reinstated the fine and period of probation (Appendix C). Petitioner did not receive notice that Judge Barry had been petitioned, ex parte, to rescind her March 13 order, nor was he given an opportunity to be heard by the court. Several days later petitioner received a certified letter, not from the District Court, but from the Probation Department in Paterson, New Jersey, containing a copy of the new order rescinding the earlier order and reinstating the fine and probation. Petitioner called the Judge's office, after consulting with several

attorneys, who indicated that it was highly unusual for a Judge to respond ex parte in such a situation. Judge Barry's law clerk advised petitioner to send a letter to the Judge asking her to reconsider. Petitioner was apprehensive as to proper procedure since there was no wish to alienate the Judge. Subsequently, petitioner sent a letter to Judge Barry asking for reconsideration. Some time later petitioner received a call from the Judge's clerk, asking petitioner to formalize the letter as a motion for reconsideration with a caption page, and this was promptly taken care of by petitioner. As expected, the AUSA submitted a brief in opposition to the motion for reconsideration, and both parties were notified that a hearing without oral argument would be held on November 26, 1990.

Over the next several months petitioner and the probation officer inquired of each other as to whether a decision had been made. Finally, on April 15, 1991, petitioner called Judge Barry's office to check on the status, and was told after a subsequent call back, that the Judge had handled the matter herself and had denied the motion on December 17, 1990, but that the "order was somehow lost in the crack". The denial of the motion for reconsideration order was entered on April 15, 1991, (Appendix D).

On April 17, 1991, after exhausting all remedies with the District Court, petitioner filed an appeal with the Third Circuit. The Third Circuit was then headed by Judge John Gibbons, and the AUSA who had prosecuted petitioner was the son of John Gibbons, Daniel Gibbons, Jr. A three judge panel denied petitioner's

request to (Appendix E) "reconsider the Rule 35 decision", but this issue was not the subject of petitioner's appeal, which clearly called into question the matter of Judge Barry rescinding an earlier ruling complete with opinion, in favor of an order without opinion, issued ex parte, which was to the detriment of petitioner. Petitioner then appealed to the full Third Circuit for reconsideration. Again, petitioner was denied an adjudication of the unilateral, ex parte order recision (Appendix F). This ruling by the Third Circuit, included the affirmative vote of Judge Samuel Alito, who was the U.S. Attorney for the District of New Jersey when petitioner was prosecuted. This matter now comes before the United States Supreme Court for action under a motion for a writ of mandamus.

REASONS FOR GRANTING THE WRIT

I.

A writ of mandamus may be issued by a court to compel an official to complete his or her ministerial duty. 28 U.S.C. § 1651(a) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law...."

It is only available when the movant has exhausted all other judicial avenues of remedy. Petitioner asked for reconsideration by the Third Circuit sitting in part and as a whole; both times petitioner's motion was denied. A prayer to the court for this extraordinary writ

is therefore proper. As was noted in Kerr v. United States District Court for the Northern District of California, 426 U.S. 394, 96 S.Ct. 2119 (1976), the writ of mandamus,

> "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise authority when it is its duty to do so'".

In Marbury v. Madison, 1 Cranch 137 (1803), Mr. Chief Justice Marshall noted the importance of the writ when he wrote,

> "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be

> pretended, that his office alone exempts him from...being compelled to obey the judgement of the law."

The writ may not command an official to perform that which is considered prerogative in nature; it must be an absolute duty as laid down by law. In United States v. Dean, 752 F.2d. 535 (1985) the government filed a notice of appeal and petitioned the court for a writ of mandamus when the United States District Court for the Southern District of Georgia reduced the sentence of a defendant. While it is not clear that Judge Barry had the discretion to rescind her March 13, 1986 Rule 35 order reducing petitioner's sentence to time served, and to reinstate the fine and probation, she certainly **did not** have the prerogative to do so without first giving notice to

petitioner that she was considering the matter, or giving him an opportunity to be heard before the court. This was a duty given to Judge Barry by the Constitution of the United States. In failing to give petitioner notice or a hearing, the District Court violated due process. A writ of mandamus, therefore, is the proper judicial remedy for this court.

II.

Petitioner contends that Judge Barry erred by reversing her earlier order without giving any notice or an opportunity for a hearing, to petitioner. During petitioner's attempts at appeal and reconsideration, the government confused the issue repeatedly. It was argued that Judge Barry may have had the right to rescind her Rule 35 order; the government also contended that by failing to appeal

the second order of Judge Barry within ten (10) days, petitioner lost his opportunity for a "bite at the apple." Such arguments are without a doubt not the point of this appeal. Petitioner was told by several attorneys that the first order was the important one, and that Judge Barry's second order need not be appealed. It is reasonable to argue that a pro se litigant could be very confused by this course of events. Petitioner is not challenging the validity of a judge, in accordance with established rules of conduct, to rescind a Rule 35 order. That action by Judge Barry should be reviewed for it was done without notice or a hearing. Yet such notice was never given, obviously making it impossible for petitioner to do anything about it.

Fundamental principles of due process demand that when an individual's liberty

are at stake before the court, there must be at the very least some notice and a hearing. Notice is unquestionably an important element of due process. When a person's reputation, honor or integrity are at stake, notice becomes an integral part of due process. Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507 (1971). Petitioner argues that to give such notice prevents courts from imposing arbitrary deprivations of liberty. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. (1983). In the case at bar, the AUSA and/or probation officer, managed to persuade Judge Barry to vacate her earlier order in an ex parte fashion. While petitioner disagrees that vacating the first order was indeed Judge Barry's prerogative, by doing so without giving petitioner any notice whatsoever, was surely not her prerogative. Therefore, petitioner

requests the court to issue the writ to correct this Constitutional violation.

III.

As the court noted in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981), when a person's property is at stake, there must be some type of hearing. Even if it is impossible to hold that hearing before the deprivation, there must at least be a "meaningful post deprivation hearing." In the case at bar, petitioner was never given any type of hearing, either before or after Judge Barry rescinded her order. It is a basic American legal principle to give an individual the right to be heard before the state imposes a serious hardship upon that individual. Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507 (1971).

Government has a duty to use "fair-

play" when it engages in decision making, especially when the liberty of a citizen hangs in the balance. Hearings serve as a safety device which halt the government from making arbitrary, substantively unfair or mistaken deprivations of property. It is essential that an individual be allowed to vindicate himself before the government takes action against that person's interest which is covered by the Fourteenth Amendment's protection of liberty and property. As the court held in Groppi v. Leslie, 404 U.S. 496, 92 S.Ct. 582 (1972), the requirement of reasonable notice and the opportunity to be heard are "basic in our system of jurisprudence." Petitioner prays that the court will issue a writ of mandamus to remedy the injustice of Judge Barry in denying petitioner his rights as guaranteed by the due process clause of

the Constitution.

CONCLUSION

The Petition for Writ of Mandamus should be granted and the original Order for reduction in sentence reinstated with the second ex parte Order rescinded.

Date: November 22, 1991

By: _____

Martin A. Welt, Ph.D.
Pro Se

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

United States of America,	:	Criminal Action
Plaintiff,	:	No. 88-87
vs.	:	
MARTIN WELT,	:	OPINION
Defendant	:	

Defendant Martin Welt was convicted following trial of various violations of the federal laws and was sentenced to two years incarceration together with a fine. He began service of his sentence on July 31, 1989 after his conviction was affirmed by the Court of Appeals for the Third Circuit. He is scheduled to be released on May 29, 1990 and now seeks a reduction of sentence pursuant to F.R. Cr.P. 35 (b).

Little defendant presents to me was

not considered prior to sentencing. Thus, I read each of the numerous letters sent to me by members of his family, and of the community, business and academic colleagues, and clergy, each of which spoke of the defendant in glowing terms. I considered, as well, the emotional burden his incarceration would place on his family and the effect it would have on their financial resources. I anticipated, moreover, and anticipated correctly, that defendant would find incarceration a difficult and humiliating experience. And, as I may or may not have noted at sentencing, I imposed a lower sentence than the Probation Department had recommended in large part because of these considerations, so persuasively presented to me by defendant's counsel.

The defendant and his family seek compassion. The emotional toll that his

incarceration is taking on his wife, mother, and daughter is severe, as Mrs. Welt's letter to me indicates. Defendant's letter articulates, at least, acceptance of responsibility for his actions and a recognition of the reality of his arrogance and lack of remorse at sentencing, and, of course, reraised to me is the fact that if defendant is incarcerated for nine months or more, a consulting agreement with R.T.I. will be deemed breached.[1]

Because further incarceration will service no useful purpose and, indeed, may well prove emotionally, physically, and financially destructive, most particularly to the defendant's family, defendant's sentence will be reduced to time served. [2] An appropriate order shall issue.

/s/

MARYANNE TRUMP BARRY

U.S.D.J.

Dated: March 13, 1990

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1. I am advised by defendant that the Parole Commission extended defendant's release date from 8 to 10 months and Mrs. Welt advises that this extension was the result of R.T.I.'s "feeding of misinformation to the DOJ". While I do not pass on whether this did or did not occur, the extension of the release date is, to say the least, curious.

2. Given this disposition, I see no necessity to reach defendant's motion to strike certain portions of the government's sentencing memorandum and the presentence report. I note, however, that F.R. Cr.p. 32 (c) (3) (D) does not provide a vehicle for correction of a sentencing memorandum and that any difficulties with the presentence report were not articulated at sentencing, although the court repeatedly pressed counsel to do so.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

United States of America,		
Plaintiff,	:	Criminal Action
vs	:	No. 88-87
	:	ORDER
Martin Welt,	:	
Defendant,	:	

This matter being opened to the court on defendant's motion for reduction of sentence, pursuant to Fed. R. Cr. P. 35 (b), and the court having considered same on the papers submitted, without oral argument, pursuant to Fed. R. Cr. P. 47; and

For the reasons expressed in this court's Opinion dated March 13, 1990,

It is on this 13th day of March 1990

ORDERED that defendant's sentence is hereby reduced to the time served.

/ s /

MARYANNE TRUMP BARRY
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

United States of America,	:	Criminal Action
Plaintiff,	:	
vs.	:	No. 88-87
	:	O R D E R
MARTIN WELT,	:	
Defendant,	:	

This matter being opened to the court on defendant's motion for reduction of sentence, pursuant to Fed. R. Cr. P. 35 (b), and the court having considered same on the papers submitted, without oral argument, pursuant to Fed. R. Cr. P. 47;

It is on this 10th day of April 1990

ORDERED that the originally imposed term of imprisonment of two years concurrent regarding counts 1 and 2 is hereby reduced to the time served, nunc pro tunc to March 13, 1990; and it is

further

ORDERED that the originally imposed fine of $50,000 with regard to count 1 and the three year concurrent probation term with regard to counts 4 through 7 remain unchanged; and it is further

ORDERED that the order dated March 13, 1990 is hereby vacated.

/ s /

MARYANNE TRUMP BARRY
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Criminal Action
Plaintiff,	:	No. 88-87
vs.	:	
MARTIN WELT,	:	ORDER
Defendant	:	

Defendant Martin Welt, having filed an untimely motion for reconsideration of this court's order of April 10, 1990 requesting yet once again that he be released from his obligation to pay a fine, and the court having previously advised defendant that it lacks jurisdiction to consider this request given that more than a year and a half has elapsed since his conviction was affirmed on appeal,

It is on this 17th day of December,

1990

ORDERED that defendant's motion is denied.

/s/

MARYANNE TRUMP BARRY
U.S.D.J.

1. Further entreaties on this issue will subject the defendant to sanctions pursuant to Fed.R.Civ.P. 11.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 91-5325

UNITED STATES

vs.

MARTIN A. WELT
(N.J. Crim. No. 87-01)
(Criminal Treated as civil)

Present: SLOVITER, CHIEF JUSTICE, SCIRICA AND SEITZ, CIRCUIT JUDGES

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;

(2) Appellee's response; and

(3) Appellant's response

in the above-captioned case.

Respectfully,

/s/
Clerk

SM/MW/clj
enc.

The appeal of the denial of the Rule 35 Motion is dismissed as untimely. The order denying reconsideration is summarily affirmed.

By the Court

/s/
Circuit Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5325

UNITED STATES

v.

MARTIN A. WELT
Appellant

(D.C. Crim. No. 87-01)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENSBURG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and SEITZ*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT

/s/

Circuit Judge